

IN THE SUPREME COURT FOR THE STATE OF MONTANA

Supreme Court No. DA 10-0221

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTUS MICHAEL MASSEY,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal From The Montana Twentieth Judicial District, Sanders County,
The Honorable Deborah Kim Christopher, presiding.

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STATEMENT OF THE ISSUES

The district court erred in dismissing the Justus Massey's (Massey) appeal based on Rule 2 of the Montana Uniform District Court Rules (MUDCR). In the alternative, Massey was denied effective assistance of counsel when his attorney failed to comply with deadlines established in both the MUDCR and the Montana Code Annotated.

STATEMENT OF THE CASE

Massey appeals the district court's dismissal of his appeal from judgment issued against him by the City Court for Hot Springs, City Judge David S. Johnson, presiding.

Massey was charged with a wide variety of misdemeanor offenses in approximately September 2008, in the City Court of Hot Springs, Montana. In June 2009, Massey's counsel filed a motion to dismiss based on violations of Massey's right to a speedy trial. (D.C. Dkt. No. 1). The City Attorney (City) properly responded and Massey's motion was denied. (D.C. Dkt. No. 1). In October 2009, Massey entered into a Plea Agreement and Stipulation for Review which disposed of Massey's misdemeanors, but reserved his right to appeal the speedy trial issue to the district court pursuant to Mont. Code Ann. §§ 46-12-204(3) and 46-17-311.

While the exact timing relating to the appeal will be addressed in the Statement of Facts, it is sufficient to say that on January 19, 2010, the district court held a brief hearing on Massey's appeal. At the beginning of the hearing, Hot Springs City Attorney Mark Russell presented the district court with a Motion to Dismiss (D.C. Dkt. No. 5). Massey's counsel eventually responded to the City's motion. (D.C. Dkt. No. 7). Shortly thereafter, the district court granted the City's motion and dismissed the appeal based on Rule 2 of the MUDCR. (D.C. Dkt. No. 8). Massey filed a timely notice with this Court and now appeals the district court's Order of dismissal.

STATEMENT OF THE FACTS

Massey had two separate causes before the Hot Springs City Court. Combined, Massey was charged with eleven misdemeanors. Massey filed a Motion to Dismiss both causes on speedy trial grounds. The City responded and the City Court denied Massey's motion. (D.C. Dkt. No. 1).¹ On October 26, 2009, Massey and the City entered into a plea agreement which settled both causes

¹According to the district court docket sheet, all documents from the city court are listed as docket number 1 in the district court file. This includes Massey's motion, the city's response, and the city court's order.

Given the district court's disposition of Massey's appeal, the merits of Massey's appeal to the district court from the city court are not addressed in the appeal to this Court.

before the City Court. Contained within the plea agreement was a provision allowing Massey to appeal the denial of his speedy trial motion to the district court. Massey filed his Notice of Appeal on November 10, 2009. The City Judge denied Massey's appeal on November 16, 2009, on the grounds that Massey had not timely filed his notice of appeal in accordance with the time limits set forth in Municipal Court Rules of Appeal. (See D.C. Dkt. No. 5, pg. 2).

On December 29, 2009, Massey filed a document entitled "Amended Notice of Appeal, Notice to the Court and Request for a Hearing." (D.C. Dkt. No. 3). This document was filed with the district court.

The district court held a status hearing on Massey's appeal on January 19, 2010. At the beginning of the hearing, counsel for the City filed a motion to dismiss Massey's appeal on the grounds that the notice of appeal was untimely, i.e. Massey's Notice of Appeal to the City Court, and his Amended Notice of Appeal to the district court had not been filed within the requisite ten-day time limit. (D.C. Dkt. No. 5). The district court stated it would first rule on the City's motion to dismiss and then, if necessary, address the substance of the appeal. (Hrg. Trans. pg. 4).

For reasons which are not evident in the record, it took Massey forty-two days to file a response to the City's Motion to Dismiss. On March 2, 2010,

Massey filed a “Response to City Court’s Motion to Dismiss Appeal and Legal Brief Supporting Defendant’s Amended Notice of Appeal.” (D.C. Dkt. No. 7). Massey argued his appeal was improperly denied by the City Court based on that Court’s misreading of the relevant time limits.²

Two days after Massey filed his Response, the district court granted the City’s Motion to Dismiss. (D.C. Dkt. No. 8). Rather than rendering a decision on the merits of the argument over the timing of the filing of the notices of appeal, the district court granted the City’s Motion to Dismiss based on Massey’s failure to respond to the City’s motion within the ten-day time period proscribed by Rule 2 of the MUDCR. The district court dismissed Massey’s appeal and remanded his case back to the Hot Springs City Court for execution of the original sentence under the plea agreement.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it dismissed Massey’s appeal based on Rule 2 of the MUDCR two days after Massey had actually responded to

²While the City Court and the City Attorney applied a ten-day time limit to file a Notice of Appeal (found in Rule 5 of the Municipal Court Rules of Appeal), Massey argued the three-day mailing period applied pursuant to Rule 6 of the City Court Rules of Civil Procedure. Massey’s brief did not address his timeliness of the filing of the Amended Notice of Appeal almost two months after his appeal was initially denied by the City Court.

the City's Motion to Dismiss.

In the alternative, if this Court does not find the district court abused its discretion, then Massey's counsel was ineffective for failing to file a responsive brief to the City's Motion to Dismiss within the requisite time period.

STANDARDS OF REVIEW

This Court's standard of review of discretionary rulings in criminal cases is whether the trial court abused its discretion. Further, this Court has also found that Rule 2(b) of the Montana Uniform District Court Rules allows the trial court discretion to either grant or deny an unanswered motion. *State v. Loh*, 275 Mont. 460, 466, 914 P.2d 592 (1996).

"We review de novo the mixed questions of law and fact presented by claims of ineffective assistance of counsel." *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. (internal citations omitted).

ARGUMENT

I. The district court abused its discretion when it dismissed Massey's appeal based on Rule 2(b) of the Montana Uniform Rules of District Court.

Rule 2(b) of the MUDCR reads, "Failure to file brief may subject the motion to summary ruling. Failure to file a brief within five days by the moving party shall be deemed that the motion is without merit. Failure to file an answer

brief by the adverse party within ten days shall be deemed an admission that the motion is well taken....” Despite this seemingly clear cut language, this Court has held Rule 2(b) “does not require a district court to grant the unanswered motion.” *State v. Loh*, 275 Mont. at 466, 914 P.2d 592, 596 (1996) (citing *Maberry v. Gueths*, 238 Mont. 304, 309, 777 P.2d 1285, 1289 (1989)). In fact, “the rule does not require the District Court to grant the unanswered motion. Rule 2(b) states that failure to file a responsive brief by the non-moving party “may” subject a motion to summary judgment. However, Rule 2(b) does not remove the discretion of the District Court to grant or deny the unanswered motion.” *State v. Fertterer*, 260 Mont. 397, 400, 860 P.2d 151, 153 (1993).

In Massey’s case, the district court’s dismissal of his appeal based on Rule 2(b) is analogous to a district courts sua sponte dismissing a case on summary judgment based not on the legal or factual merits at the heart of the issue but, rather, on a technicality of timing.

When all is said and done, the essential question for the District Court in deciding a motion for summary judgment either for the plaintiff or for the defendant is whether there exists a genuine issue of material fact. That inquiry does not admit of decision merely on a technical point, such as whether briefs have been filed on time.

Cole v. Flathead County, 236 Mont. 412, 416, 771 P.2d 97, 100 (1989).

Massey does not dispute that he failed to file a response to the City’s Motion to

Dismiss within the ten-day limit set forth in Rule 2(b). However, there is also not dispute that he did respond to the City's motion before the district court dismissed his appeal based solely on a mere "technical point." *Id.*

While the merits of Massey's appeal from the Hot Springs City Court are not appropriate for review by this Court due to the way the district court disposed of the case, Massey's response to the motion to dismiss is relevant in that it raised a genuine issue of legal and factual dispute. Before the district court, the City argued Massey had missed the deadline to appeal a municipal court decision to district court by filing the notice on the eleventh day. Rule 5 of the Municipal Court Rules of Appeal creates a ten-day deadline by which criminal cases may be appealed to the district court. (D.C. Dkt. No. 5, pg. 2). Massey argued he had properly complied with the deadlines set forth in Rule 6 of the City Court Rules of Civil Procedure which provides for a three-day mailing period extension to the applicable time limits. Therefore, a genuine question of law and fact existed due to the apparent conflict between Rule 5 of the Municipal Court Rules of Appeal and Rule 6 of the City Court Rules of Civil Procedure. Regardless of whether Massey was correct or the City was correct, the district court did not address the merit of the issue.

The district court's dismissal of Massey's appeal based on Rule 2(b) was a

particular abuse of discretion because Massey had responded before the district court dismissed his appeal. This Court has interpreted Rule 2(b) “as allowing the trial court discretion to either grant or deny *an unanswered motion*.” *Loh*, 275 at 466, 914 P.2d 592, 596 (emphasis added). Massey had answered the City’s motion before the district court deemed the City’s Motion to Dismiss as well taken. Had the district court entered its dismissal before Massey responded, it would have been properly exercising its discretion as set forth by this Court and by Rule 2(b). However, once Massey provided a substantive response the District Court’s discretion under Rule 2(b) narrowed. No longer was the City’s Motion unanswered. Additionally, based on the substantive arguments raised by Massey in response, the City’s Motion could no longer be deemed well taken. Massey had raised a genuine issue which the district court should have addressed.

Therefore, because Massey had responded and because the City’s Motion to Dismiss could not be deemed well taken based on Massey’s failure to respond, the district court abused its discretion by dismissing Massey’s appeal based solely on Rule 2(b). Massey requests this Court vacate the district court’s dismissal and remand the case back to the district court for a decision on the merits of the City’s Motion to Dismiss.

II. If this Court holds the district court abused its discretion by dismissing Massey's appeal on Rule 2(b) grounds, then it must also hold that Massey was denied effective assistance of counsel.

Should this Court affirm the district court's dismissal of Massey's appeal based on Rule 2(b) grounds, it results in the logical conclusion that Massey was denied effective assistance of counsel that resulted in prejudice because his counsel failed to make a timely response to the City's Motion to Dismiss.

A criminal defendant has a guaranteed right to effective assistance of counsel through both the United States Constitution and the Montana Constitution. This Court has adopted the *Strickland* standard in evaluating questions of effective assistance of counsel. *See State v. Rogers*, 2001 MT 165, ¶ 7, 306 Mont. 13, 32 P.3d 724. The *Strickland* standard, as detailed in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), establishes a two-prong test to assess if a defendant was denied effective assistance of counsel. First, the defendant must establish counsel made errors so serious that counsel's conduct fell short of the range of competence required of attorneys in a criminal case; and second, if counsel did indeed error, the defendant must establish the error was prejudicial. *Rogers*, at ¶ 7. A court examining a claim that counsel was ineffective begins with the strong presumption that counsel acted withing the

range of competence and exercised professional judgment. *See Robinson v. State*, 2010 MT108, ¶ 12, 356 Mont. 282, ___ P.3d ___.

Despite this strong presumption, there are certain instances in which counsel's failure amount to per se error. "Failure to preserve a defendant's right to appeal when the defendant has requested notice to be filed is error." *State v. Tweed*, 2002 MT 286, ¶ 18, 312 Mont. 482, 59 P.3d 1105 (overruled on other grounds) (citing *Rogers*, 2001 MT 165 at ¶ 24, and *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 1034-35, (2000)). In *Tweed*, this Court held that, "by failing to file timely notice, Tweed's counsel failed to preserve his right to appeal. While counsel's error may not have been intentional in this case, the error prejudicial *per se*, constitutes ineffective assistance of counsel and violate's Tweed's constitutional right to counsel." *Tweed*, 2002 MT 286 at ¶ 21.

Massey's case presents an interesting issue in that Massey may have two claims of ineffective assistance of counsel: first, that his counsel failed to make a timely notice of appeal to the City Court – which resulted in the initial dismissal of the appeal and, second, that his counsel was ineffective because she failed to timely respond to the City's Motion to Dismiss which ultimately resulted in the dismissal of his appeal based solely on his counsel's failure to timely respond. While there is no record as to why it took over a month for Massey's counsel to

respond to the City's Motion, no such record is necessary. Counsel's failure to respond to the Motion to Dismiss was *per se* error and satisfies both prongs of *Strickland*. It is axiomatic that all attorneys – civil or criminal – have a duty to understand and be aware of deadlines set forth in the applicable rules of the court in which the client's case is being heard. A basic understanding of the rules and the timing of motions or responses is, perhaps, the lowest bar of professional competence. There can be no doubt that Massey's counsel failed to file a timely response to the City's Motion to Dismiss under MUDCR 2(b). Additionally, Massey's counsel's response came so late it would not have met any conceivable deadline applicable under any district court rule, uniform or otherwise. Thus, because Massey's counsel's conduct fell short of the range of competence required of attorneys in a criminal case, the first *Strickland* prong is satisfied.

Although this Court has held a failure to file a notice of appeal is prejudicial *per se*, it has not so held on a failure to file a response within the context of MUDCR 2(b). While a *per se* presumption of prejudice may not be available, it is clear that counsel's failure to timely respond in Massey's case resulted in a clear prejudice to his case. Simply put: the City files a Motion to dismiss; Massey had ten days to file a response; Massey's counsel did not make a timely response; the district court dismissed Massey's case because his counsel had not responded. But

for counsel's error – i.e. a timely response – the district court could not have dismissed his case based solely on Rule 2(b). Further, it cannot be assumed that Massey's counsel had a strategic reason for failing to respond in a timely manner because she did, eventually, respond. The response was, however, too late. The district court did not deny Massey's appeal based on any argument made by the City, nor any deficiency in Massey's late response. Rather, the district court denied Massey's appeal based solely on the fact that his counsel had failed to respond to the motion to dismiss. Finally, the prejudice to Massey will be compounded should this Court find the district court did not abuse its discretion in dismissing Massey's appeal on the basis of MUDCR 2(b). Thus, the second prong of *Strickland* is satisfied. But for counsel's error, the district court would have had to decide the City's Motion to Dismiss on its merits.

Therefore, because Massey has met both of the prongs of *Strickland*, he would respectfully request that this Court vacate the district court's dismissal of his appeal and remand the case back to the district court in order that it may decide the City's Motion to Dismiss on its merits.

CONCLUSION

Because the district court dismissed Massey's appeal based solely on the fact that he had failed to make a timely reply to the City's Motion to Dismiss, the

district court either abused its discretion by dismissing the appeal even though Massey had indeed filed a response, or Massey's counsel was ineffective for failing to make a timely response to the City's Motion. Under either scenario, Massey is entitled to relief and to have this Court remand his case back to the district court for a decision on the merits of the City's Motion to Dismiss.

Respectfully submitted this 12th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words as calculated by my WordPerfect X3 software.

Dated this 12th day of July, 2010.

/s/ Colin M. Stephens
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CERTIFICATE OF SERVICE

I, Colin M. Stephens, do hereby certify that I sent, or caused to have sent, a true and correct copy of the foregoing Appellant's Opening Brief to the following:

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